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IN THE

Supreme Court of the United States

JACK MURPHY, individually and as a member of AK Capital LLC, suing on behalf of himself and all other members of AK Capital LLC similarly situated and in the right of AK Capital LLC,

Petitioner,

—v.—

KOREA ASSET MANAGEMENT CORPORATION,

Respondent,

AK CAPITAL LLC,

Defendant.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) Whether the Court of Appeals correctly affirmed the District Court's decision that Respondent Korea Asset Management Corporation ("KAMCO") is a "government organ" under the Foreign Sovereign Immunities Act, 28 U.S.C. § 1603(b) ("FSIA"), and thus immune from suit, where the District Court found that KAMCO, among other things, was established by Korean statute for the national purpose of stabilizing the Korean economy by purchasing assets of bankrupt Korean companies, is actively overseen and supervised by the Korean government, is financed by the Korean government, is exempt from certain taxes in Korea, holds certain exclusive rights under Korean law, and is treated by Korean law as a government agency.

2) Whether certiorari should be denied where, under the governing precedents of any Court of Appeals, KAMCO would be found to be a "government organ" pursuant to the FSIA.

3) Whether the District Court's discretionary ruling granting an evidentiary hearing of limited scope, which Petitioner rejected, fails to present an issue for which certiorari should be granted.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Supreme Court of the United States ("Sup. Ct. R."), Respondent Korea Asset Management Corporation ("KAMCO") states that its largest shareholder is the Republic of Korea, which owns 42.3 percent of KAMCO's shares. The Korea Development Bank, which is wholly owned by the Republic of Korea, owns 26.9 percent of KAMCO's shares. The remaining 30.8 percent of KAMCO's shares are owned by several private banks, none of which owns more than 10 percent of KAMCO's shares.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Korea Asset Management Corporation ("Respondent" or "KAMCO") respectfully submits this brief in opposition to the Petition for a Writ of Certiorari submitted by Jack Murphy ("Petitioner"), dated November 22, 2006 ("Petition").

INTRODUCTION

This Court should not grant a writ of certiorari in this case because Petitioner fails to demonstrate how the resolution of any alleged circuit split – even if one exists – would affect the outcome of his claims given the facts underlying this controversy. Under any approach articulated to date by any circuit that has addressed the issue, KAMCO would be found a government organ under the Foreign Sovereign Immunities Act, 28 U.S.C. § 1603 ("FSIA"). As the District Court correctly found, and the Court of Appeals affirmed, "KAMCO was created for a quintessential government purpose, to 'contribute to the development of the financial industry and the national economy through improving the liquidity and soundness of financial institutions.'" App. 31.[1] In addition, the District Court found that KAMCO is directly supervised by the Korean government, App. 33-34, holds exclusive rights over a fund backed by government bonds, App. 35, is largely funded by

[1] For consistency, we adopt the same citation system as Petitioner: "App. __" designates a page in the appendix to the Petition, while "A. __" indicates a page in the Joint Appendix submitted to the Court of Appeals.

and financially dependant on the Korean government, App. 38, and is majority-owned by Korea directly and through a government-owned bank, App. 38. Thus, KAMCO indisputably meets the standards for a government organ developed by the Second, Third and Fifth Circuits, respectively, as these analyses are virtually identical and would all place significant emphasis on KAMCO's "government purpose."

Moreover, assuming *arguendo* that the Ninth Circuit's application of its government-organ analysis differs from the analyses used by other circuits, as the Solicitor General and U.S. State Department have suggested in their *amicus curiae* brief in *Powerex Corp. v. Reliant Energy Servs. Inc.*, Case No. 05-85, 2006 WL 3357058 (Nov. 14, 2006) ("Solicitor General Br."), the Ninth Circuit would nonetheless undoubtedly find KAMCO to be a government organ. In fact, in *EIE Guam Corp. v. Long Term Credit Bank*, 322 F.3d 635, 640 (9th Cir. 2003), *cert. denied* 540 U.S. 1003 (2003), the Ninth Circuit affirmed that a corporation formed by the Japanese government to "purchase, administer, collect and dispose of non-performing loans purchased from failed financial institutions" – the same purpose for which KAMCO was formed – is a government organ. Petitioner has presented no argument that the Ninth Circuit would rule differently with respect to KAMCO than it did in *EIE Guam Corp.* Indeed, Petitioner does not even cite *EIE Guam Corp.*, despite the District Court's reliance upon it and its obvious relevance to this case.

Because the courts below correctly found KAMCO to be a government organ, and because the outcome of Petitioner's claims would be the same regardless of which circuit's precedents are applied, this case does not present an appropriate vehicle for this Court to address any alleged split

in circuit authority. Certiorari is therefore unwarranted in this case.

STATEMENT OF THE CASE

I. Factual Background

A. KAMCO

KAMCO is indisputably an organ of the Korean government, as the District Court found and the Court of Appeals summarily affirmed. *See* App. 38, 49. Created under Korean law in 1962 and modified by statute in 1997, KAMCO has the "quintessential government purpose" of stabilizing the Korean economy in the wake of the Asian financial crisis of the late 1990s, through the purchase of non-performing loans of bankrupt Korean companies at above-market prices. *See* App. 8-9, 31. To help KAMCO accomplish this purpose, the Korean government granted KAMCO exclusive rights over a "Resolution Fund" financed by government-backed bonds, as well as exclusive authority over the non-performing loans it purchases. *See* App. 35. Because KAMCO performs this essential government function, it is also subject to extensive state oversight. *See* App. 12, 33-34. For these reasons and others, the lower courts correctly held that KAMCO qualifies as a government organ under the FSIA and is immune from suit unless an enumerated exception applies. *See* App. 38-40, 49.

Petitioner attempts to argue around the District Court's well-supported factual findings by making several false assertions about KAMCO. *First*, Petitioner's unsubstantiated claim that "the Republic of Korea does *not* supervise KAMCO," Petition at 11 (emphasis in original), completely contradicts the findings of the District Court. Indeed, as the District Court found, KAMCO's Management

Committee must include officials from Korea's Ministry of Planning and Budgeting, the Financial Supervisory Service, the Ministry of Finance and Economy, and the Korea Development Bank – all government ministries and agencies. *See* App. 33; A. 301, 315. The District Court also found that KAMCO is subject to audit by the Korean National Assembly and the Korean Board of Audit and Inspection and that the Korean Financial Supervisory Commission exercises *de facto* control over the appointment of KAMCO's CEO. *See* App. 33. These facts led the District Court to conclude that "[t]here is substantial evidence in the record that the Korean government actively oversees and supervises KAMCO." *Id.*

Second, Petitioner incorrectly portrays KAMCO's ownership structure as dominated by private investors. *See* Petition at 11. In fact, the District Court found that the Republic of Korea effectively owns a majority of KAMCO's shares, directly and indirectly through the Korea Development Bank, which in turn is wholly-owned by the Republic of Korea. *See* App. 9.[2] The remaining minority share of KAMCO is owned by a group of private Korean banks. *See id.*

Third, Petitioner incorrectly claims that KAMCO is treated as a private entity for purposes of tort claims. *See* Petition at 11. To the contrary, KAMCO's actions can subject the Korean government to liability under the Korean State Compensation Act ("KCSA"), the Korean equivalent

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[2] At the time the District Court published its opinion, the Republic of Korea owned, directly and indirectly, 71.4% of KAMCO. *See* App. 9. Since the District Court's decision, the ownership structure of KAMCO has changed slightly; the Korean government currently owns 69.2% of KAMCO, directly and through the Korea Development Bank.

of the U.S. Federal Tort Claims Act. *See* App. 36; A. 454. KAMCO is also subject to suit under the Korean Administrative Litigation Act ("KALA"), which legislates the procedures for suing government agencies. *See* A. 459.

Fourth, Petitioner inaccurately states that the District Court found KAMCO "behaves like a typical for-profit corporation." Petition at 12 (internal quotations omitted). In fact, the District Court expressly concluded that, while some of KAMCO's activities are similar to that of a non-governmental corporation, "in many respects KAMCO ***does not*** actually operate as a 'for profit' corporation." App. 10 (emphasis added). For example, the District Court observed that KAMCO sells the non-performing loans it purchases at a substantial loss, "in effect subsidizing the holder of the bad debt." App. 10. The District Court then went on to detail the numerous other ways KAMCO functions as a government organ. *See* App. 10-13.

Finally, contrary to Petitioner's claims that KAMCO's "private shareholders earn millions of dollars each year in *profits*," Petition at 21 (emphasis in original); the District Court expressly found that KAMCO's "modest" profits from the sale of non-performing loans are "distributed to the institutions that contributed money to the Resolution Fund, not to KAMCO's shareholders." App. 10. Indeed, the District Court further noted that "the distribution of any profits arising from KAMCO's other operations is subject to further limitations not applicable to for-profit corporations." *Id.*

B. The Underlying Transaction

Petitioner similarly misstates the facts regarding the transactions underlying his derivative suit against KAMCO. Indeed, contrary to what Petitioner alleges, Petition at 8, KAMCO did not first approach Alex Kwon with an offer to sell the assets of the bankrupt Hanbo Iron & Steel Co. ("Hanbo"). Rather, in 1998, Hanbo's creditors, including KAMCO, held an international auction for Hanbo's assets open to all qualified investors. *See* App. 14. The Nabors Consortium, a financing group led by Mr. Kwon, won that initial auction, but in the fall of 2000, negotiations with the Nabors Consortium collapsed, and the Consortium withdrew from the deal. *See id.*

After this failed transaction, Mr. Kwon initiated negotiations with KAMCO for a proposed private sale of the Hanbo assets to him. *See* App. 15. As part of these negotiations, KAMCO representatives met with Mr. Kwon in New York on October 13, 2000, but contrary to Petitioner's claims, Petition at 9, KAMCO's representatives never stated that they controlled the sale of Hanbo's assets. Rather, KAMCO's representatives stated explicitly at the meeting and in a follow-up letter that any terms of a private sale were subject to approval by Hanbo's other creditors and the Bankruptcy Division of the Seoul Central District Court ("Korean Bankruptcy Court"), the court supervising Hanbo's reorganization. *See* A. 551, 553. Soon after this meeting, Hanbo's creditors rejected the possibility of a private sale to Mr. Kwon and decided instead to hold a second international auction to find a purchaser for Hanbo's assets. *See* App. 21.

After the proposal for a private sale collapsed, Mr. Kwon and Petitioner created AK Capital LLC ("AK Capital"), the alleged real party in interest in this derivative action, in order to participate in the second international auction.[3] *See* App. 20-21. Critically, as the District Court noted, all actions related to the second international auction (including all actions described in the complaint upon which this action is based) took place outside of the United States. *See* App. 43-44. AK Capital won the second international auction, and it executed a Sale and Purchase Agreement ("SPA") with Hanbo on February 12, 2003. *See* A. 42. Over the next nine months, AK Capital experienced difficulties assembling the necessary financing and requested two extensions of the SPA's financing deadline, both of which were granted. *See* A. 43-50. Despite these extensions, AK Capital failed to procure the required financing, and the Korean Bankruptcy Court refused to approve a third extension. As a result, the SPA automatically terminated, and AK Capital forfeited its $27 million earnest money deposit, in accordance with the terms of the SPA. *See* A. 49-50.

II. Proceedings Below

A. The Motion to Dismiss

Petitioner filed this derivative action in the Supreme Court for the State of New York against AK Capital and KAMCO on March 17, 2004, asserting three causes of action

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[3] Contrary to Petitioner's assertions that "[a]t the time of the October 13th meeting, AK Capital was known as AK Capital B.V.," Petition at 9, n.8, the District Court explicitly held that "there is nothing to suggest that AK Capital LLC was involved in the October 13, 2000 meeting," nor was AK Capital LLC "directly involved in Kwon's private offer to assume the Nabors SPA . . . ." *See* App. 20.

related to the second international auction and the loss of the $27 million deposit. KAMCO removed the case, under the provisions of 28 U.S.C. §§ 1441 and 1446, to the U.S. District Court for the Southern District of New York on April 5, 2004.

On June 11, 2004, KAMCO moved to dismiss on the grounds of sovereign immunity, *forum non conveniens*, failure to plead a derivative action with particularity, and failure to state a claim. The motion to dismiss was briefed by the parties during the remainder of 2004, with both sides submitting voluminous evidence in the form of declarations and documents from the transaction. *See* App. 6, fn.2.

In early 2005, during a conference call with the District Court, Petitioner requested an evidentiary hearing on the motion to dismiss. *See* A. 573. After the parties and the District Court exchanged several letters on the subject, the District Court granted Petitioner's request for a hearing, but limited the scope of that hearing to testimony supplementing the evidence already submitted on the issue of sovereign immunity. *See* A. 582. Petitioner thereafter rejected the District Court's invitation for a hearing, writing that he "concluded that there are sufficient facts before the Court to sustain our position that KAMCO is not protected by the FSIA." *Id.* Respondent agreed that a hearing was unnecessary. *See* A. 584.

On September 30, 2005, the District Court dismissed the action against KAMCO on the ground that KAMCO is a Korean government organ, and therefore immune from suit under the FSIA unless one of the exceptions to immunity enumerated in the statute applied. *See* App. 38-40. In a detailed opinion, the District Court described at great length the various attributes of KAMCO, leading to the conclusion that it was a government organ and thus qualified for

sovereign immunity. *See* App. 3-46. Significantly, in finding KAMCO a government organ, the District Court relied not only on Second Circuit jurisprudence, but also extensively on authority from the Ninth Circuit, App. 27, 31, 32, 39, and the Fifth Circuit, App. 29, 30. The District Court further found that KAMCO had not taken any action in the United States that gave rise to the complaint; thus, no exception to immunity applied under the FSIA. *See* App. 40-46. The District Court did not address the remaining asserted grounds for dismissal.

B. The Court of Appeals

Petitioner appealed to the Court of Appeals for the Second Circuit, which, after briefing and oral argument, affirmed the District Court's ruling by summary order on July 6, 2006. *See* App. 47-50. While explicitly relying on the District Court's "very thorough" analysis with regard to the finding that KAMCO is a government organ, App. 49, the Second Circuit separately addressed and rejected Petitioner's contention that he was unfairly denied a hearing, writing that "[t]he decision of the district court lay well within its discretion." App. 50.

Petitioner then filed a petition for rehearing *en banc*, which was denied on August 28, 2006. *See* App. 51-52.

C. The Related Arbitration

Shortly after KAMCO filed its motion to dismiss in this case, AK Capital, the alleged real plaintiff in interest, initiated arbitration proceedings in Hong Kong against Hanbo's Trustee, in his official capacity as representative of Hanbo. Although AK Capital chose to name a different defendant in the arbitration, AK Capital made nearly identical claims to those Petitioner seeks to assert

derivatively in this action. *See* A. 393. The case was heard by an arbitral tribunal (after extensive discovery and witness submissions) in December 2005. In July 2006, the arbitral tribunal rendered its decision, dismissing all of AK Capital's claims.

It is therefore preposterous for Petitioner – a derivative plaintiff – to decry the "extreme consequences . . . resulting in the dismissal of his complaint," and to assert hysterically that "a terrible injustice has been done to a United States citizen and a domestic company." Petition at 24. AK Capital, the real party in interest in this case, has had its claims fully adjudicated by an esteemed group of international arbitrators, making Petitioner's derivative action (and appeals) entirely unnecessary.

REASONS FOR DENYING THE PETITION

I. Certiorari Should Be Denied Because Resolution of the Alleged Circuit Conflict Would Have No Bearing on the Outcome of this Case.

Certiorari is ordinarily denied in cases where the resolution of the alleged conflict in authority is irrelevant to the ultimate outcome of the action before this Court. *See* Robert L. Stern, et al., SUPREME COURT PRACTICE § 4.4, at 231 (8th ed. 2000) (citing *Sommerville v. United States*, 376 U.S. 909 (1964)). As this Court observed in *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959), "[w]hile this Court decides questions of public importance, it decides them in the context of meaningful litigation."

In this case, even assuming *arguendo* that Petitioner correctly identifies a clear and intolerable split in circuit authority regarding the proper approach to determining government-organ status under the FSIA, resolution of this

conflict would have no bearing on Petitioner's claims, since KAMCO would be held to be an organ of a foreign state under any of the relevant circuit standards. As such, a grant of certiorari is not warranted.

A. KAMCO is an Organ of a Foreign State Under Second, Third and Fifth Circuit Precedents.

The Courts of Appeals for the Second, Third and Fifth Circuits have all adopted nearly identical standards for determining whether an entity is a government organ under the FSIA. *See* Solicitor General Br. at *8. In *Filler v. Hanvit Bank*, 378 F.3d 213, 217 (2d Cir. 2004), the Second Circuit adopted the standard articulated by the Fifth Circuit in *Kelly v. Syria Shell Petroleum Development B.V.*, 213 F.3d 841, 846-47 (5th Cir. 2000), *cert. denied* 531 U.S. 979 (2000), which described five factors relevant to a court's determination of whether an entity is an "organ of a foreign state" under the FSIA:

> *(a)* whether the foreign state created the entity for a national purpose;
>
> *(b)* whether the foreign state actively supervises the entity;
>
> *(c)* whether the foreign state requires the hiring of public employees and pays their salaries;
>
> *(d)* whether the entity holds exclusive rights in the foreign state; and
>
> *(e)* how the entity is treated under foreign state law.

The Third Circuit utilizes the same factors, and adds two more gleaned from the Ninth Circuit's decision in *Patrickson v. Dole Food Co., Inc.*, 251 F.3d 795 (9th Cir. 2001), *aff'd on other grounds*, 538 U.S. 468 (2003): the circumstances surrounding the entity's creation, and the entity's ownership structure. *See USX Corp. v. Adriatic Ins. Co.*, 345 F.3d 190, 209 (3d Cir. 2003), *cert. denied* 541 U.S. 903 (2004). The other circuits have not articulated these as formal factors, but consider them in practice. *See, e.g.*, *Filler*, 378 F.3d at 216 ("The KDIC is a Korean governmental institution created by [statute] and a presidential decree."); *Kelly*, 213 F.3d at 847 ("Syrian Petroleum Company was established according to Syrian law . . . and it is owned entirely by the Syrian government.").

In each of the Second, Third, and Fifth Circuits, the factors enumerated provide a framework for determining an entity's status, but courts generally do "*not* apply them mechanically or require that all five support an organ-determination." *Kelly*, 213 F.3d at 847 (emphasis in original); *see also USX*, 345 F.3d at 208 (emphasizing "flexible approach" to organ analysis); App. 38 (eschewing "a mechanical application of the *Filler* factors"). Moreover, as the Solicitor General writes, these courts "understand the need to apply the factors with constant reference to the ultimate question: whether the defendant is 'an entity that engages in activity serving a national interest and does so on behalf of its national government.'" Solicitor General Br. at *9 (citing *USX*, 345 F.3d at 209).[4]

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[4] Incredibly, Petitioner describes the "national purpose" factor as "minor," Petition at 22, despite the fact that this prong is given substantial weight under the relevant precedents. *See, e.g.*, *USX*, 345 F.3d at 209; *Patrickson*, 251 F.3d at 807.

After a full description of KAMCO's attributes, App. 8-13, the District Court balanced each of the five factors outlined in *Filler* and *Kelly*. *See* App. 29-38. Ultimately, the District Court concluded, and the Second Circuit affirmed, that KAMCO is a Korean state organ because it was:

> [C]reated by statute in 1962 and modified by statute in 1997; it is largely funded by and financially dependant on the government of Korea, which directly or indirectly (through the KDB) owns more than 70% of its outstanding shares; KAMCO has exclusive control over the Resolution Fund, which is funded by government-backed bonds; it is directly supervised by the FSC, which reports to the President of Korea, as well as several other agencies of the Korean government; it is exempt from paying certain taxes, such as acquisition and securities transaction taxes, and also potentially benefits from any other tax relief that the national or local governments deem 'necessary' for its welfare; its management committee is composed of officials from Korea's Ministry of Finance and Economy, Ministry of Planning and Budgeting, the Korea Development Bank, and the Financial Supervisory Service; ***and, perhaps most significantly, KAMCO has a quintessentially 'public' mission, to service and stabilize the Korean economy by efficiently disposing of non-performing loans and restructuring failing corporations.***

App. 38-39 (emphasis added).

This holding is consistent with other appellate decisions in the Second, Third and Fifth Circuits examining state organs that engage in commercial transactions for government purposes.[5] *See Filler*, 378 F.3d at 220 (finding the Korea Deposit Investment Company engaged in a "public function" by "ensuring the stability of the South Korean banking system"); *USX*, 345 F.3d at 211 (endorsing lower court's finding that state-owned insurance company was an organ of Irish state where entity was owned indirectly by the government to "serve[] an important governmental interest, namely protecting the Irish insurance and banking industries from financial disaster"); *Kelly*, 213 F.3d at 848 (finding Syrian oil company to be a state organ where entity was created for a "national purpose," several "high-level Syrian government officials" were board members of the entity, and the entity had "exclusive rights to explore and develop Syria's identified petroleum reserves").

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[5] Although Petitioner implies that corporations should never be immune under the FSIA, Petition at 14, these cases are in keeping with the legislative history of the FSIA, which makes clear that commercial concerns can be considered government agencies or instrumentalities:

> [E]ntities which meet the definition of an 'agency or instrumentality of a foreign state' could assume a variety of forms, including a state trading corporation, a mining enterprise, a transport organization such as a shipping line or airline, a steel company, a central bank, an export association, a governmental procurement agency or a department or ministry which acts and is suable in its own name.

H.R. Rep. No. 94-1487, at 15-16, *reprinted in* 1976 U.S.C.C.A.N. 6604, 6614.

B. KAMCO Is an Organ of a Foreign State Under Applicable Ninth Circuit Authority.

Although the Solicitor General has argued that, in *California v. NRG Energy Inc.*, 391 F.3d 1011 (9th Cir. 2004), the Ninth Circuit deviated from the other circuits by analyzing organ status in a mechanical fashion while failing to give appropriate weight to the public purpose of the entity at issue in that case, Solicitor General Br. at *9 12, KAMCO would clearly be a government organ under Ninth Circuit authority as well. As such, resolving any alleged circuit conflict would not affect the outcome of this case. Indeed, although Petitioner attempts to argue his case using the circuit conflict identified by the Solicitor General and the U.S. State Department in *Powerex*, he does not even attempt to show how adoption of the Ninth Circuit's analysis – or, indeed, *any* circuit's analysis – would alter the outcome in this case.

In reality, the Ninth Circuit's standard is closely analogous to the standards employed in the other circuits. In *Patrickson*, 251 F.3d at 807, the Ninth Circuit held:

> In defining whether an entity is an organ, courts consider whether the entity engages in public activity on behalf of the foreign government. In making this determination, courts examine the circumstances surrounding the entity's creation, the purpose of its activities, its independence from the government, the level of government financial support, its employment policies, and its obligations and privileges under state law.

As articulated, this approach significantly overlaps with the standards used by the Second, Third and Fifth Circuits. *See Filler*, 378 F.3d at 217; *USX*, 345 F.3d at 208; *Kelly*, 213 F.3d at 847-48.

Application of this analysis to KAMCO would lead to the same result reached in the Second Circuit: a finding that KAMCO is a government organ.[6] In fact, in *EIE Guam Corp.*, the Ninth Circuit, applying the *Patrickson* "government organ" standard, found an entity quite similar to KAMCO – the Japanese Resolution and Collection Corporation ("RCC") – to be a government organ. The similarities between KAMCO and the RCC are striking:

- KAMCO and the RCC were created for almost identical national purposes. *Compare* App. 30 (finding KAMCO's national purpose is "to rescue Korean financial institutions by purchasing and disposing of non-performing loans at prices in excess of what the loans would be worth on the open market") *with EIE Guam Corp.*, 322 F.3d at 640 (observing that "the Japanese government created the RCC to carry out Japanese national policy related to revitalization of the Japanese

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[6] Petitioner's reliance on the "spirit" of this Court's decision in *Dole Food Co. v. Patrickson*, 538 U.S. 468 (2003), Petition at 2, is misplaced, as that case did not address the government-organ standard, but instead addressed only whether an entity must be majority-owned directly by a foreign state to qualify as an "instrumentality" under the second prong of 28 U.S.C. § 1603(b). Courts writing after *Dole* have noted that while the ownership test outlined in *Dole* is a bright-line rule, the government-organ analysis should remain a flexible standard. *See, e.g.*, *USX*, 345 F.3d at 208 (finding that FSIA text "suggests the need for a more flexible approach under the organ prong of section 1603(b)(2) than the Court adopted in *Dole* with respect to the ownership prong of that section").

financial system [namely] to purchase, administer, collect and dispose of non-performing loans purchased from failed financial institutions") (internal quotation omitted).

- Both KAMCO and the RCC have exclusive authority under foreign state laws to perform many of their functions. *See* App. 35 ("KAMCO has the exclusive right to use the Resolution Fund to acquire and dispose of non-performing loans."); *EIE Guam Corp.*, 322 F.3d at 640 ("[M]any of the RCC's activities are performed exclusively by the RCC . . . .").

- KAMCO and the RCC are both substantially funded by their parent governments. *See* App. 11-12 (finding that the Korean state "can assume KAMCO's debts, pay its employees, or provide any other financial support it deems necessary"); App. 38 (finding that KAMCO is "largely funded by and financially dependent on the government of Korea"); *EIE Guam Corp.*, 322 F.3d at 640 (endorsing lower court's finding that "the RCC is funded by the Japanese government").

- Also, as did the District Court below in this case, the Ninth Circuit considered arguments against a finding that the RCC is a government organ, including "that the RCC is a private company that is engaged in a primarily commercial concern . . . that the RCC's employees are not civil servants; and that the RCC is not a public corporation . . ." *Id.* at 641. Nonetheless, the Ninth Circuit held that the "key assertion" was the RCC's public purpose, and held that, "[o]n balance, the relevant factors weigh in favor of a conclusion that the RCC is an organ of Japan." *Id.*

Given its holding in *EIE Guam Corp.*, the Ninth Circuit would surely apply its government-organ analysis in favor of KAMCO and find it to be, like the RCC, a government organ. Indeed, the District Court below relied extensively on the holding in *EIE Guam Corp.*, as it noted that "it is undisputed that KAMCO serves an almost identical function in Korea" as the RCC in Japan. App. 31; *see also* App. 27, 32, 39. The District Court below also relied on the Ninth Circuit's decision in *Patrickson* for the proposition that "the ultimate question for purposes of FSIA 'organ' status is 'whether the entity engages in a public activity on behalf of a foreign government.'" App. 38-39.

Moreover, even under the Ninth Circuit's allegedly "mechanical" approach to determining government-organ status in *NRG Energy*, KAMCO would be found to be a government organ. In *NRG Energy*, the Ninth Circuit held that although there was "some evidence that [Powerex] serves a public purpose," Powerex's "high degree of independence from the government of British Columbia;" its "lack of financial support from the government;" and "its lack of special privileges or obligations under Canadian law dictate holding that Power[e]x is not an organ of British Columbia." 391 F.3d at 1026. In sharp contrast to these findings, the District Court below not only found that KAMCO serves a "quintessential" government purpose, but also that it is closely supervised by the Korean government, is financially dependent on the government, and holds exclusive legal rights in Korea. App. 38. Thus, far from being "in direct conflict," as Petitioner claims, Petition at 2, this case and *NRG Energy* are easily reconciled since KAMCO undoubtedly qualifies as a government organ under the *NRG Energy* ruling.

In summary, assuming for the sake of argument that there are substantive differences between the manner in which the different circuits determine whether an entity is a government organ, such differences would not affect the outcome in this case. Under the relevant authorities of all circuits in question, including the Ninth Circuit, KAMCO is a government organ. Therefore, the Petition should be denied.

C. The Ninth Circuit's Decision in *NRG Energy v. California* Does Not Create a Circuit Conflict.

At most, the *NRG Energy* ruling represents a misapplication of the Ninth Circuit's government-organ analysis, limited to the facts of that case. Indeed, the actual standard articulated by the Ninth Circuit in *NRG Energy* is essentially identical to the standards used by other circuits. *See NRG Energy*, 391 F.3d at 1026 (applying factors outlined in *Patrickson*, while emphasizing the "ultimate question" of "whether the entity engages in a public activity on behalf of the foreign government"); *see also* Solicitor General Br. *8 (conceding that the standards among the circuits are very similar in their formal articulation). In fact, the circuits largely seem to have borrowed their approaches from each other: the Fifth Circuit approach in *Kelly*, which formed the basis for the Second Circuit's approach in *Filler*, was itself derived from Ninth and Third Circuit precedents. *See Kelly*, 213 F.3d at 846-47 (citing *Corporacion Mexicana de Servicios Maritimos, S.A. de C.V. v. M/T Respect*, 89 F.3d 650, 655 (9th Cir. 1996) and *Supra Med. Corp. v. McGonigle*, 955 F. Supp. 374, 378-79 (E.D. Pa. 1997)). The Third Circuit, in *USX*, molded its approach from the Fifth Circuit in *Kelly* and the Ninth Circuit in *Patrickson*. *See* 345 F.3d at 209.

Despite these parallels in circuit precedent, the Solicitor General argues that the Ninth Circuit's "application" of its government-organ standard in *NRG Energy* – applying the standard mechanically and deemphasizing the national purpose prong of the analysis – creates a circuit conflict. *See* Solicitor General Br. at *9. However, any misapplication of the Ninth's Circuit's approach is limited to its decision in *NRG Energy*. In *EIE Guam Corp.*, for example, the Ninth Circuit gave weight to the "key assertion" of public purpose and engaged in a balancing test among the different factors to determine "government organ" status under the FSIA. 322 F.3d at 641. In *Patrickson*, the Ninth Circuit similarly gave weight to the public purpose prong, but found that the company in question was "acting to maximize profits rather than pursue public objectives."[7] 251 F.3d at 808. In *Gates v. Victor Fine Foods*, 54 F.3d 1457, 1460-61 (9th Cir. 1995), the Ninth Circuit balanced a number of factors to conclude that a corporation that performed the public purpose of marketing hogs from a particular Canadian province was a government organ.

Thus, while the Solicitor General argues that a circuit conflict is evidenced by the Ninth Circuit's failure to give proper weight to the public purpose factor and its "mechanical" application of the factors in *Powerex*, Solicitor General Br. at *9-10, in fact the Ninth Circuit's decision in *NRG Energy* appears to have been merely a failure to follow

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[7] *Compare* App. 10 (finding that KAMCO "negotiates prices that are substantially in excess of what the loans are worth on the open market – in effect subsidizing the holder of the bad debt").

its own precedents in *EIE Guam Corp.*, *Patrickson*, and *Gates*.[8]

D. The Second Circuit's Summary Order in This Case Does Not Create a Circuit Conflict.

Even if there is an actual split in authority among the circuits regarding the proper approach to determining government-organ status, the decision below – a summary order – will never actually conflict with any other circuit decision. Under the Second Circuit's Interim and Proposed Permanent Rule ("2d Cir. Int. R.") 0.23(b), "rulings by summary order do not have precedential effect." Moreover, no summary order filed before January 1, 2007 can be cited in any case other than the case in which the order was entered, a related case, or for the purposes of *res judicata* or collateral estoppel. 2d Cir. Int. R. 0.23(c)(2).

Thus, the Second Circuit's summary order in KAMCO is not an appropriate vehicle for repairing any alleged circuit conflict.

II. The Court of Appeals Correctly Affirmed the Ruling That KAMCO Is an Organ of the Korean Government.

In its order affirming the District Court's thorough and well-reasoned decision finding KAMCO to be an "organ of a foreign state," the Court of Appeals properly adhered to

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[8] To the extent that the Ninth Circuit's precedents are in apparent conflict with each other, such intra-circuit disputes do not generally provide grounds for exercise of this Court's certiorari jurisdiction. *See Wisniewski v. United States*, 353 U.S. 901, 902 (1957) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties.").

accepted precedent regarding the determination of organ status under the FSIA, eliminating any need for this Court to exercise its supervisory power. *See* Sup. Ct. R. 10(a).

As discussed above, *supra* at 13-15, the District Court fully analyzed the five factors articulated by the Second Circuit in *Filler* when determining whether an entity qualifies as an organ of a foreign state under the FSIA:

- Applying the first *Filler* factor – whether the entity was created for a national purpose – the District Court found that "there is ***overwhelming evidence in the record*** that KAMCO was established by the Republic of Korea for a national purpose," namely, to rescue Korean financial institutions by purchasing non-performing loans at above-market prices and repackaging and selling them on the domestic and international markets. *See* App. 30 (emphasis added).

- With regard to the second *Filler* factor – whether the foreign state actively supervises KAMCO – the District Court found that "[t]here is substantial evidence in the record that the Korean government actively oversees and supervises KAMCO." App. 33; *see also* App. 12-13.

- Although the District Court found that the third *Filler* factor – whether the foreign state requires the hiring of public employees and pays their salaries – did not support an organ determination in favor of KAMCO, the District Court also observed that "[t]here is little evidence in the record relevant" to this factor. App. 34.

- With respect to the fourth *Filler* factor – whether KAMCO holds exclusive rights in Korea – the District Court correctly found that KAMCO "clearly" holds exclusive rights over the Resolution Fund and the non-

performing loans it acquires, and thus concluded that this factor "weighs heavily in KAMCO's favor." App. 35.

- Finally, the District Court found the fifth *Filler* factor – whether KAMCO is treated as a public entity under Korean law – to be equivocal. *See* A-38. However, the District Court correctly recognized that for many purposes, KAMCO is treated strictly as a government organ, and added:

> Keeping in mind that this final factor – and, indeed, this whole analysis – is not an all-or-nothing proposition, the Court draws the following conclusions from this debate. While it is certainly relevant that KAMCO officials are amenable to suit in their individual capacity for certain purposes, it is more important that they are subject to suit as government officials for other purposes because *truly private* individuals would *never* be subject to suit as government officials. The same goes for KAMCO itself – truly private corporations would never be subject to suit as a government entity, or subject the Korean government itself to suit, whether under the [KALA] or the KSCA. In other words, it simply does not follow that KAMCO is *not* an organ of the Korean government for purposes of FSIA immunity simply because it is subject to suit alongside private Korean corporations.

App. 37 (emphasis in original).

Correctly "eschewing a mechanical application," the District Court weighed these factors and concluded that "KAMCO has clearly established that it is an organ of the Korean government." App. 38. This analysis in no way departed from the usual course of judicial proceedings, and does not mandate use of this Court's supervisory powers. *See* Sup. Ct. R. 10(a).

III. There Is No Important Question of Federal Law Presented by the Facts of this Case.

Although the resolution of any alleged material circuit conflict regarding analyses used to determine "government organ" status may be important, the outcome of this case would not be affected by such a resolution, for the reasons outlined above. *See supra* at 11-22. Thus, the Petition, which requests relief based on the facts of this case, presents no important question of federal law for this Court to adjudicate. *See* Sup. Ct. R. 10(a), (c).

Similarly, Petitioner provides no evidence for his alarmist proposition that without Supreme Court intervention, "[s]ince foreign firms can easily claim to be organs of their local governments, they will continue to strategically exploit the immunity provided under the FSIA and to cannily elude the jurisdiction of our courts." Petition at 20. When the Solicitor General and the U.S. State Department, in their *Powerex* amicus brief, argue that the issue presented therein "is an important, recurring, and sensitive one," their concern is not that U.S. citizens will be abused by foreign corporations, but rather that the Ninth Circuit's decision in *NRG Energy* will undermine the critical protections of foreign government organs enshrined in the FSIA. *See* Solicitor General Br. at *6. This case, however, presents no such danger, as the courts below correctly found KAMCO to be a government organ.

IV. The District Court's Discretionary Ruling Regarding an Evidentiary Hearing Was Correct and Does Not Give Rise to an Issue Worthy of Review by this Court.

There is no issue for this Court to review with regard to the limited hearing that was granted by the District Court but rejected by Petitioner. *See supra* at 8. As recognized by the Second Circuit, the decision to limit the scope of the proposed hearing (or even to have the hearing at all) was entirely within the discretion of the District Court, and the District Court did not abuse that discretion in light of the declarations and documents submitted by the parties. *See* App. 50; *Filetech S.A. v. France Telecom S.A.*, 157 F.3d 922 (2d Cir. 1998) ("[T]he district court should consider all the submissions of the parties and ***may*** hold an evidentiary hearing, if it considers such a hearing is warranted, in resolving the question of jurisdiction.") (emphasis added).

More importantly, Petitioner has not even attempted to explain how this discretionary ruling is at odds with Supreme Court precedent or demonstrates a conflict among the circuits. *See* Sup. Ct. R. 10(a). Indeed, Petitioner does not even cite a case in this portion of his Petition. *See* Petition at 22-25. Nor does Petitioner identify an important federal question presented by the District Court's discretionary ruling. *See* Sup. Ct. R. 10(a). Finally, Petitioner cannot reasonably argue that the District Court's grant of his request for a hearing – albeit on limited terms – "so far departed from the accepted usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power." Sup. Ct. R. 10(a).

It would therefore be inappropriate to grant certiorari to address the District Court's discretionary grant of a hearing in this case.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

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